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No. PD-0867-18
Court of Appeals No. 04-17-00187-CR
Trial Court No. CR16-153

IN THE COURT OF

CRIMINAL APPEALS

AUSTIN, TEXAS

TROY ALLEN TIMMINS,
Appellant,

vs.

STATE OF TEXAS,
Appellee.

FROM THE FOURTH COURT OF APPEALS, SAN ANTONIO, TEXAS & 198TH JUDICIAL DISTRICT COURT, BANDERA COUNTY, TEXAS

APPELLANT'S REPLY TO THE STATE'S BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

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IDENTITY OF PARTIES & COUNSEL

Appellant certifies that the following is a complete list of the parties, attorneys, and any other person who has any interest in the outcome of this appeal:

Appellant:	Troy Allen Timmins
Appellee:	The State of Texas
Attorneys for Appellant:	M. Patrick Maguire M. Patrick Maguire, P.C. 945 Barnett Street Kerrville, Texas 78028 Ryan Kellus Turner 4602 Arapahoe Trail Austin, Texas 78745

Attorneys for Appellee:	Hon. Scott Monroe 198th Judicial District Attorney 400 Clearwater Paseo, Suite 500 Kerrville, Texas 78028 Hon. David A. Schulman Attorney at Law 1801 East 51st Street, Suite 365-474 Austin, Texas 78723
Trial Judge:	Hon. Rex Emerson 198th Judicial District Judge 700 Main Street Kerrville, Texas 78028
Court of Appeals:	Fourth Court of Appeals Cadena-Reeves Justice Center 300 Dolorosa, Suite 3200 San Antonio, Texas 78205-3037

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STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that oral argument would be helpful to the Court because there is no clear statutory guidance or case precedent regarding the issues raised in Appellant's Brief on the Merits. Additionally, the issues raised in Appellant's Brief on the Merits are issues of first impression.

STATEMENT OF THE CASE

Appellant, Troy Allen Timmins, is appealing his conviction for the felony offense of bail jumping/failure to appear. CR, 90. Appellant was convicted of this offense by a jury on March 22, 2017. CR, 77. Appellant's offense was enhanced to a second degree felony. CR, 77. The jury sentenced Appellant to 20 years in the Texas Department of Criminal Justice – Institutional Division on March 22, 2017. CR, 77. Appellant timely filed his Notice of Appeal. CR, 104. Appellant appealed the trial court's decision to the Fourth Court of Appeals. Oral argument was granted. On July 18, 2018, the Fourth Court of Appeals affirmed the trial court's judgment in a published opinion authored by Justice Chapa.

The Court of Criminal Appeals granted Appellant's Petition for Discretionary Review on November 21, 2018. Appellant's Brief on the Merits was filed on January 7, 2019. Appellee filed its brief on or about February 15, 2019. The Court granted Appellant leave to file a reply brief. Appellant's Reply Brief is timely filed by being electronically filed with the Court of Criminal Appeals on March 15, 2019.

SUMMARY OF THE ARGUMENTS

I. The Fourth Court of Appeals erred in affirming Appellant's conviction for bail jumping/failure to appear because the evidence is legally insufficient to support Appellant's conviction. The term "appear" as used in the statute means to appear for a court proceeding. Appellant failed to report to jail as ordered by the trial court. Therefore, Appellant could not be convicted of bail jumping & failure to appear.

The Fourth Court of Appeals also erred in affirming Appellant's conviction because Appellant was not "released" from custody as required by the bail jumping/failure to appear statute. Appellant's bail was revoked by the trial court and the trial court ordered Appellant to report to jail later the same afternoon. Appellant remained under restraint pursuant to a lawful order of the trial court. Therefore, Appellant remained in custody. Because Appellant was not "released" from custody, Appellee failed to prove an essential element required to convict Appellant and the evidence is legally insufficient to support the conviction.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that this brief contains 3,810 words (counting all parts of the document and relying upon the word count feature in the software used to draft this brief). The body text is in 14 point font and the footnote text is in 12 point font.

/s/ M. Patrick Maguire
M. Patrick Maguire,
Attorney for Appellant

REPLY TO STATE'S BRIEF

Plain English: Failing to Report to Jail Does Not Equal Bail Jumping/Failure to Appear

Failing to report to jail does not equal bail jumping/failure to appear. Although failing to comply with an order to report to jail is different than bail jumping/failure to appear, there are still consequences for disobedience of a court order. The mechanism for enforcing an order to report to jail is procedural and rooted in a court's inherent power. "A court has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including the authority to issue the writs and orders necessary or proper in aid of its jurisdiction." *Tex. Gov't Code §21.001*. A violation of a lawful court order may be punished as a contempt of court. *Tex. Gov't Code §21.002*. An example of this is the trial court's ability to issue a capias for the defendant's arrest pursuant to article 23.01 of the Texas Code of Criminal Procedure. *Tex. Code Crim. Proc., art. 23.01*. Under article 23.01, the trial court has the authority to issue a capias "after commitment or bail and before trial." *Tex. Code Crim. Proc., art. 23.01(1)*. In contrast, the bail jumping/failure to appear statute is rooted in substantive criminal law and is not a court's cudgel.

A defendant is culpable for "jumping bail" or failure to appear if he intentionally or knowingly fails to appear in court at the time and date set for

an appearance, even if he was released on his own personal recognizance without bond (as in traffic cases).

This proposition is backed up by scholarly commentary. In their commentary on the Texas Penal Code, renowned jurist and professor, Ed Kinkeade, and renowned criminal defense attorney, S. Michael McColloch, point out that the offense of bail jumping/failure to appear occurs when a court appearance is missed. *See, e.g., Ed Kinkeade & S. Michael McColloch, Texas Penal Code Annotated* (Thompson West 2007) at 456. (emphasis added). One of the most revered form books in criminal law, *McCormick and Blackwell's Criminal Forms and Trial Manual*, authored by Hon. Michael J. McCormick, former presiding judge of the court of criminal appeals, and Hon. Thomas D. Blackwell, former state district judge, states that an indictment alleging the offense of bail jumping/failure to appear should allege that the defendant was released from custody on condition that he subsequently appear ***in court***. *Section 28, Texas Practice, Volume 7, 11th Edition, pg. 199* (2005). (emphasis added).

Something is going on here. Either the word "appear," as relates to bail jumping/failure to appear cases, has acquired a technical meaning that means to "appear in court" or renowned legal scholars and judges have gotten this all wrong for years.

While Appellee may not want to admit that it is asking this Court to expand the commonly accepted meaning and application of the bail jumping/failure to appear statute, it is implicit in its reply brief. When challenged by Appellant to contemplate the possible future consequences of such an expansion, Appellee responds, "[s]uch conclusory allegations without citing authority do not carry weight or merit consideration." *State's Brief, page 12*.

Judicial Discretion vs. Judicial Restraint

Appellee claims that a more narrow reading of the bail jumping/failure to appear statute would unduly restrict judicial discretion to allow a defendant a brief period of time to get his affairs in order in the interest of justice." *Appellee's Brief, pages 11-12*.

Judicial discretion should be tempered by judicial restraint. Arguably, in construing bail jumping/failure to appear, judicial restraint has been absent in both the trial court and court of appeals. Unless a statute clearly authorizes a judge or justice to act on his or her own personal sense of what is right, Appellant contends judicial decision-making should be rooted in either text or commonly accepted legal practice, some authority exterior to a justice or judge's will or preference. *See John F. Manning, Justice Scalia and the Idea of Judicial Restraint,* 115 Mich. L. Rev. 747 (2017).

In framing our analysis, counsel for the Appellant has scavenged through more than 40 years or published and unpublished case law and has studied learned treatise to better understand bail jumping/failure to appear. In Appellant's brief on the merits, counsel has cited to such authority. Appellee has not. Appellee believes that this case should be decided based off of the trial court's will or preference. Appellant's counsel disagrees. If judicial restraint means anything, it is that judicial discretion does not allow everything.

1. <u>What Appellee Left Out</u>

Code Construction Act

Appellant's brief cites Section 311.011 of the Government Code (Code Construction Act) and its provision that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." *Tex. Gov't Code §311.011(b)*. This statute is an important component of the analysis in this case as evidenced by the attention given to this statute by both Appellant and the court of appeals.

Appellant pointed out that the court of appeals acknowledged that the word "'[a]ppear' can be used in a technical sense to mean 'coming into court as a party or interested person'" but then the court goes on to apply broader

definitions to the word despite the Code Construction Act's mandate that such words shall be construed according to their technical meaning. *Timmins Opinion, pages 7-9*. Rather than address Appellant's argument that the court of appeals ignored the Code Construction Act's mandate, Appellee doubles down in its brief by referencing the Fourth Court's statement that "'can" is not "shall" – especially so in regard to a word so broad in scope as the common word appear.'" *State's Brief, page 9*. Appellee fails to cite the Code Construction Act except for a single time - in a footnote in its brief. *State's Brief, page 9*.

Instead, Appellee's brief takes a somewhat "freewheeling" approach to the language in 38.10. Appellee suggests that Appellant (and the Fourth Court of Appeals) engage in an unnecessary academic exercise in attempting to ascertain the technical meaning of Section 38.10's language. *State's Brief, page 7* ("[t]he State asserts that such an analysis is of academic interest, but not necessary to the disposition of this issue according to the arguments postulated above.").

Appellee, however, cites to this Court's opinions in *Liverman v. State*, 470 S.W.3d 831 (Tex. Crim. App. 2015) and in *Prichard v. State*, 533 S.W.3d 315 (Tex. Crim. App. 2017). Appellee incorporates the following quote from these opinions: "[i]f a word or a phrase has acquired a technical

or particular meaning, it should construe the word or phrase accordingly." *State's Brief, page 8*. This is language from the Code Construction Act. Yet Appellee fails to grapple with this other than to suggest that to do so is an academic exercise "not necessary to the disposition of this issue." *State's Brief, page 7*.

Lack of Precedent from Appellee

In the face of treatises and case authority suggesting that the word "appear" means to "appear for a court appearance," Appellee fails to point this Court to any precedent where the bail jumping/failure to appear statute has been used in any other context other than when a defendant failed to appear in court.

Appellee then contends that "[i]f Appellant's claim that the word 'appear' has clearly morphed into 'appear in a court proceeding' by legions of cases, then this case could not be a case of first impression." *State's Brief, pages 9-10*. This contention is illogical. This is a case of first impression precisely because "appear" and "release" are always given their technical meaning. The *application* of the bail jumping/failure to appear statute to this case, in a manner in which it has never been applied in the past, is what makes this a case of first impression.

State Fails to Distinguish B.P.C.

In addition to failing to provide any case authority that would challenge Appellant's position, Appellee fails to distinguish the *B.P.C.* case cited by Appellant. The Court will recall that Appellant cited the *B.P.C.* case for the proposition that when the trial court remands a defendant to custody, but permits the defendant a brief reprieve to handle personal matters, the defendant remains in the constructive custody of the trial court. *Appellant's Brief, pages 17-18*. In such a case, the offense of escape, not failure to appear, has been committed when the defendant fails to return as ordered. *Appellant's Brief, page 18*. Appellee argues that *B.P.C.* is distinguishable because in *B.P.C.*, the defendant's confinement was suspended only briefly, to be resumed as soon "as the leave was over" whereas in Appellant's case, "the trial court did not order Appellant to remain in custody with his confinement suspended only briefly as in *B.P.C.*" *State's Brief, page 7*. However, this is exactly what the trial court did. The trial court revoked Appellant's bail (thus placing him in custody) and suspended his confinement briefly so that he could take his mother home.

2. ***Reply to State's Arguments***

Appellee's "Arcane" Argument

Appellee opens its argument with quotes from a law review article that criticizes lawyers' ability to write in plain English. *State's Brief, page 3.* The operative statement from this quote is that "[t]he result is a writing style that has, according to one critic, four outstanding characteristics. It is: (1) wordy, (2) unclear, (3) pompous, and (4) dull." *State's Brief, page 3*. Appellee argues that the meaning Appellant "seeks to place upon the ordinary and common plain English words 'release' and 'appear' fit squarely within the above statement, and looks backwards to the past in legal writing technique and style." *State's Brief, page 3*.

Contrary to Appellee's assertion, it is not "arcane" to assign technical, particular meanings to words that have acquired such technical or particular meanings in the context of criminal practice. It is legally required. While Appellant can empathize with the sentiment expressed by Appellee, the fact of the matter is that in our business words matter. When someone has been convicted of a felony offense, and is subject to the attendant loss of liberty that such an offense may entail, it is incumbent upon us as appellate advocates and judges to ensure that we accurately determine the meaning of the words in the applicable penal statute. While it is tempting to bemoan the

difficulty and frustration often presented in such a situation, as attorneys and judges, this is what we are charged to do.

Most importantly, however, this is what the law requires. This is borne out in areas such as the Code Construction Act and the litany of case authority scrutinizing and parsing the meaning of words in various contexts. That is the essence of the authority cited by Appellant in his brief and the accompanying analysis.

The Importance of Proper Jury Instructions

Appellee contends that "[b]ecause the trial judge released Appellant to take his mother home, without any restraint whatsoever, no rational juror could conclude other than that Appellant had been released from custody." *State's Brief, page 5*. However, the jury charge contains no definition of the word "release." CR, 64-65. Further, the jury was not instructed that if the judge temporarily suspends the defendant's confinement to handle personal matters, that the person is still in custody and is not "released." *See In re B.P.C.*, 2004 Tex. App. LEXIS 4729, 2 (Tex. App.—Austin 2004, no pet.) (mem. op.). Had a rational juror been given the proper definitions of "release" in the jury instructions, that juror would not have found that Appellant was released. The concept that legally technical terms require proper jury definitions is not a new or revolutionary idea.

Escape vs. Bail Jumping/Failure to Appear

Appellee asks the Court to "[i]magine the jurors' blank stares if, at trial, Appellee had argued that Appellant 'escaped' when the evidence showed he was released from custody, with permission for that release being given by the trial court judge." *State's Brief, page 6*. Appellee argues that a jury would never have found Appellant guilty of escape. *State's Brief, pages 5-6.*

This is blatantly incorrect. The only precedent either side can point to that has factual similarities to Appellant's case is the *B.P.C.* case. The juvenile defendant in *B.P.C.* was adjudicated guilty for the offense of escape after being remanded to jail, but then had his confinement temporarily suspended so that he could go get some things from home, and he failed to return as ordered. This is essentially the same scenario as Appellant. In *B.P.C.*, Justice Puryear writing for the Third Court of Appeals rejected bail jumping/failure to appear as a "strange fit." *In re B.P.C.*, 2004 Tex. App. LEXIS 4729, 2 (Tex. App.—Austin 2004, no pet.). The *B.P.C.* case illustrates that there is another avenue for Appellee to pursue to address Appellant's actions in this case. Nonetheless, a prosecutor's ability or inability to convict someone under another statute is of no concern to the interpretation of the bail jumping/failure to appear statute.

Peculiarities in this Case

There are some significant facts that make this case somewhat peculiar. First, the trial court permitted a defendant whose bond has been revoked to leave the courtroom. Second, there was no written order to appear. The exchange at the bench was between Appellant's trial counsel and the judge trying to sort out how to get Appellant's mother home, as she didn't know how to get back to San Antonio. It was trial counsel who raised this issue, not Appellant. During this discussion, the trial judge told Appellant to report to the Bandera County Jail by 3 p.m. that same day. Appellant pointed out that the indictment fails to allege that Appellant failed to appear for a court proceeding. *Appellant's Brief, page 15*. All of this is important because Appellee bore the burden of proving the proper *mens rea*—that Appellant knowingly and intentionally failed to appear in accordance with the terms of his release. *Appellant's Brief, page 15*. There was no written order. Appellant's bond was revoked. What exactly were the terms of his release? Appellant raises this point to illustrate how unusual this case is. Despite the specific and peculiar facts of this case, Appellee ignores that it is possible for a person to be released from a courtroom but remain in constructive custody.

Setting the Record Straight

Finally, Appellant would be remiss if he did not correct various misstatements of the record in Appellee's brief. Appellee alleges that Appellant was released from custody in open court "for the purpose of taking his mother home before he was to be incarcerated for alleged violations of the terms of his bail bond release." *State's Brief, page 2*. Appellee also alleges that Appellant was "freely driving [his] mother down the highway." *State's Brief, page 12*.

Both of these statements are inaccurate. Appellant neither took his mother home, nor did he freely drive his mother down the highway. Rather, Appellant's elderly mother drove her son to court because Appellant could not drive. She did not know her way back to San Antonio from Bandera and there was concern about her ability to return home alone safely. RR 6, 125-26. Appellee also insinuates that Appellant requested the trial court's permission to escort his mother home. However, the record shows no such thing. Rather, the issue emerged during an exchange between defense counsel and the judge.

3. Conclusion

Failing to report to jail is distinct from bail jumping/failure to appear. The peculiar facts presented in this case set the table for a choice between

judicial discretion and judicial restraint. This Court, if it adopts the reasoning and arguments of Appellee, will permit application of the bail jumping/failure to appear statute in a manner that has never been done before. Judicial discretion will be given where it has not heretofore existed. The basis for this new judicial discretion will be birthed from a case with very peculiar and unusual facts.

If this Court adopts Appellant's arguments, which are based upon application of existing case authority, statutory construction and scholarly commentary, then this Court will be following a policy of judicial restraint which recognizes the historical application of the bail jumping/failure to appear statute and the unusual nature of this case. If the opinion of the court of appeals is affirmed and its rationale accepted with the imprimatur of the Court of Criminal Appeals, it would be a significant departure from the black-letter law and a seeming endorsement of something resembling judge-made law.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Honorable Court sustain the appellate contentions herein, reverse the judgment of the Fourth Court of Appeals, and render a judgment of acquittal.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT, TROY ALLEN TIMMINS

CERTIFICATE OF SERVICE

This is to certify that on March 15, 2019, a true and correct copy of the above and foregoing document was served on Hon. Scott Monroe, 402 Clearwater Paseo, Kerrville, Texas 78028 via electronic transmission at *scottm@198da.com*; on Hon. David A. Schulman, 1801 East 51st Street, Suite 365-474, Austin, Texas 78723 via electronic transmission at *zdrdavida@davidschulman.com*; and that I have mailed a true and correct copy of the above and foregoing document to Appellee's Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

/s/ M. Patrick Maguire
M. Patrick Maguire